

## **Rule 15, Ariz. R. Crim. P.**

### **PRETRIAL ALLEGATIONS – Notice of intent to seek death penalty must be timely filed.....Revised 12/2009**

Rule 15.1(i)(1), Ariz. R. Crim. P., requires the prosecutor in a capital case to provide the defendant “notice of whether the prosecutor intends to seek the death penalty.” This notice must be given “no later than 60 days after the arraignment in superior court.” *Id.*

In *Barrs v. Wilkinson*, 186 Ariz. 514, 516, 924 P.2d 1033, 1035 (1996), the Arizona Supreme Court explained that this rule “was adopted primarily because due process requires adequate notice to capital defendants that they might be sentenced to death,” *citing Lankford v. Idaho*, 500 U.S. 110 (1991). In *Barrs*, the State did not timely file its notice, and eventually filed it almost three months late. The defendant moved to strike the notice as untimely. When the trial court denied the motion to strike the notice, the defendant sought special action relief from the Arizona Supreme Court. That Court held that the trial court should have granted the defendant a hearing on the issue of whether the State should be precluded from seeking the death penalty. The Court rejected the defendant’s argument that a late filing of the notice of intent to seek the death penalty deprived the trial court of jurisdiction to impose the death penalty, and also rejected the argument that any late filing would automatically preclude the trial court from considering the death penalty unless the State could show “good cause” for the late filing. However, the Court noted that the trial court could find that the death penalty should be precluded under the circumstances of the case:

Depending on the circumstances, a continuance may well be the appropriate remedy for a 15.1(g)(1)<sup>1</sup> violation. It is indisputable, however, that preclusion of the death penalty is also an available sanction. See Rule 26.3(c)(1), Ariz.R.Crim.P. (“Upon a determination of guilt in a capital case, the trial court shall set a date for the aggravation/mitigation hearing *if the state, pursuant to Rule 15.1(g)(4), is not precluded from and is seeking the death penalty.*”) (emphasis added). Prohibiting the prosecution from seeking a capital sentence is not without precedent, *see, e.g., State v. Dearbone*, 125 Wash.2d 173, 883 P.2d 303 (1994); *State v. Rackley*, 275 S.C. 402, 272 S.E.2d 33, 34 (1980), and may be appropriate where, for instance, the state's violation is particularly egregious or the defendant will clearly suffer harm. Trial judges should also bear in mind that postponements can complicate already-congested calendars and may actually reward wrongdoers by providing additional preparation time. See *Scott*, 24 Ariz.App. at 205, 537 P.2d at 42.

*Barrs v. Wilkinson*, 186 Ariz. 514, 516, 924 P.2d 1033, 1035 (1996).

When the delay in seeking the death penalty was brief, the Arizona Supreme Court has upheld trial courts that have not stricken notices of intent to seek the death penalty. In *State v. Tankersley*, 191 Ariz. 359, 371, ¶ 50, 956 P.2d 486, 498 (1998), the State filed its notice one day late. The Arizona Supreme Court allowed the notice of intent to seek the death penalty to stand, reasoning that the defendant showed no prejudice from the day of delay. *See also State v. Jackson*, 186 Ariz. 20, 24, 918 P.2d 1038, 1042 (1996).

The Court has also allowed the formal written notice to be filed late when the defendant had, in fact, been timely informed that the State sought the death penalty. In *State v. Lee*, 185 Ariz. 549, 555, 917 P.2d 692, 698 (1996), the State filed its written notice of intent to seek the death penalty eighty-seven days late. The Arizona Supreme Court upheld the denial of a motion to preclude the State from seeking the death penalty “because it was undisputed that the defendant had actual oral notice as

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<sup>1</sup> This Rule is now numbered Rule 15.1(i)(1).

evidenced by discussions during plea negotiations and defense counsel's contacts with death penalty lawyers throughout Arizona.” The Court said that a defendant seeking to demonstrate an abuse of discretion “should be prepared to show some prejudice from surprise or delay.” *Id.* at 556, 917 P.2d at 699.

In another late-notice case, the defendant showed prejudice from surprise or delay justifying preclusion of the death penalty. In *Holmberg v. De Leon*, 189 Ariz. 109, 938 P.2d 1110 (1997), the State filed a notice of intent to seek the death penalty fifteen months late. The defense filed a motion to strike the notice as untimely. The State responded that the defendant had not shown any prejudice from the delay because, after the untimely notice, the trial court continued the trial for five months. The Arizona Supreme Court disagreed, noting, “A decision to seek the death penalty sets in motion a series of significant effects” affecting the trial court, the prosecution, and the defense. *Id.* at 110, 938 P.2d at 1111.

It is against this backdrop that Rule 15.1(g)(1), Ariz. R. Crim. P., was adopted. By requiring notice of intent to seek the death penalty no later than thirty days after arraignment, all of these wheels are set in motion at the outset. It alerts all the participants to the special needs involved in the trial of a capital case.

*Id.* at 111, 938 P.2d at 1112. The Arizona Supreme Court found the delay “particularly egregious.” *Id.* at 112, 938 P.2d at 1113.

This is not a case in which the state discovered aggravating circumstances during trial preparation, which would make it appropriate to seek leave to file a tardy notice. Instead, this case was characterized by the state as a capital offense at the proceedings on the return of the indictment. ...The filing of a notice of intent to seek the death penalty cannot be a fifteen-month afterthought. This would completely eviscerate the purpose sought to be achieved by the rule. The parties, the lawyers, the court, and all others must know that it is a death case from the outset.

*Id.* However, the Court also has suggested that if the State did not discover the circumstances justifying a request for the death penalty until later in the proceedings, the State could appropriately file the notice of intent to seek the death penalty when the State finally learned of those facts. *Id.*